

STATE'S MOTION TO TRY DEFENDANT *IN ABSENTIA*

When a defendant waives his presence at trial by voluntarily absenting himself from the proceeding, the State may try him *in absentia*.

The State of Arizona, by and through the undersigned deputy, hereby moves to try the defendant *in absentia*. The following Memorandum supports this request.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Facts and Procedural History

II. Law

Rule 9.1, *Ariz.R.Crim.P.* provides that:

Except as otherwise provided in these rules, a defendant may waive the right to be present at any proceeding by voluntarily absenting himself or herself from it. The court may infer that an absence is voluntary if the defendant had personal notice of the time of the proceeding, the right to be present at it, and a warning that the proceeding would go forward in his or her absence should he or she fail to appear.

Caselaw has interpreted what type of notice is required, and how often it must be given, in order to support a finding that a defendant has voluntarily absented himself from a hearing. Written notice of the time of the proceeding, the defendant's right to be there, and a warning that the trial will proceed without the defendant is sufficient to comply with Rule 9.1. *State v. Pena*, 25 Ariz.App. 80, 80, 541 P.2d 406, 406 (1975) . The *Pena* court also found that there is no requirement that a defendant be notified after every continuance that the case will proceed without him if he chooses to not appear. *Id.* at 81, 541 P.2d at 407.

The trial court may infer that a defendant's absence is voluntary if he personally received such notice. *E.g., State v. Vaughn*, 163 Ariz. 200, 204, 786 P.2d 1051, 1055 (App. 1989), *review denied* March 6, 1990. As stated by the court in *State v. Suniga*, 145 Ariz. 389, 392, 701 P.2d 1197, 1200 (App. 1985), *review denied* June 18, 1985, "The rule creates an inference and does not require the trial court to make a finding that the defendant has voluntarily absented himself before proceeding." Once the record establishes that notice was given to the defendant, then the burden shifts to the defendant to prove that his absence was involuntary. *State v. Bohn*, 116 Ariz. 500, 503, 570 P.2d 187, 190 (1977). Furthermore, there is no due process requirement for the trial court to hold a hearing on the question of the voluntariness of the absence unless the defendant meets this burden. *Bohn*, 116 Ariz. at 503, 570 P.2d at 190; *State v. Goldsmith*, 112 Ariz. 399, 400, 542 P.2d 1098, 1099 (1975).

The *Suniga* court held that the trial court did not abuse its discretion in finding that the defendant had voluntarily absented himself where his attorney offered no evidence to suggest that his absence was anything but voluntary, and told the court that he had no explanation for the defendant's absence. *Id.* Similarly, in *State v. Fristoe*, 135, Ariz. 25, 35, 658 P.2d 825, 835 (App. 1982), *review denied* February 8, 1983, defense counsel's admission that he had personally advised the defendant of the trial date and that the defendant had failed to contact him during the past three to four weeks supported the trial court's finding that the defendant had waived his presence at trial.

III. Argument

IV. Conclusion

Based upon the foregoing, the State moves to try the defendant *in absentia*.